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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRANSPORTATION•COMMUNICATIONS
INTERNATIONAL UNION,
Petitioner,

v.

MT PROPERTIES, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a rail carrier's duty under 45 U.S.C. §§ 152 First and 153 First(i) to submit all disputes arising out of collective bargaining agreements to adjustment boards extinguished, by operation of the exemption procedures provided in 49 U.S.C. § 10505, when the carrier elects to lease its rail lines to another entity for continued operations of the same rail service?

2. Does a court's nullification of a party's right to arbitrate a dispute concerning whether a contract applies to protect employee interests, when that nullification is based on the court's reading of the commands of 45 U.S.C. §§ 152 First and 153 First(i) to make those commands consistent with the court's view of 49 U.S.C. §§ 10505 and 10901, constitute a violation of the Just Compensation and Due Process clauses of the Fifth Amendment to the Constitution of the United States?

3. Does a court have the right to usurp the role of an arbitrator and decide the merits of a contract dispute in determining whether the Fifth Amendment of the Constitution of the United States has been violated?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. The TCU's Efforts to Arbitrate	3
B. The District Court Decision	6
C. Court of Appeals' Decision	7
REASONS FOR GRANTING THE WRIT	9
I. THIS CASE PRESENTS IMPORTANT ISSUES OF FEDERAL LAW, FOR THE PROPER INTERPRETATION OF THE RAILWAY LABOR ACT'S MANDATORY ARBITRATION PROVISIONS ARE CRUCIAL TO THE EFFECTIVE ADMINISTRATION OF THAT ACT	10
II. THE EIGHTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS CONCERNING THE RAILWAY LABOR ACT IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS IN *WILEY* AND *NOLDE* AND THE DECISION OF ANOTHER CIRCUIT COURT	15
III. WHETHER THE EIGHTH CIRCUIT'S INTERPRETATION OF THE INTERRELATIONSHIP BETWEEN THE RLA AND THE ICA HAS DEPRIVED EMPLOYEES OF CONTRACTUAL RIGHTS IN VIOLATION OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES PRESENTS AN IMPORTANT QUESTION OF LAW	18
CONCLUSION	23

TABLE OF AUTHORITIES

CASES RELIED UPON: Page

Armstrong v. United States, 364 U.S. 40 (1960) 18
Ass'n of Flight Attendants v. Delta Air Lines, Inc., 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990) 9, 16, 17
AT&T Technologies v. CWA, 475 U.S. 643 (1986) .. 20-21
Barrett v. Pennsylvania-Reading Seashore Lines, 245 F.2d 579 (3d Cir. 1957) 20
Brotherhood of Railway Carmen v. ICC, 880 F.2d 562 (D.C. Cir. 1989), *cert. granted sub nom. Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n* and *CSX Transportation, Inc. v. Brotherhood of Railway Carmen*, 110 S. Ct. 1522 (1990) 9, 14
Brotherhood of R. R. Trainmen v. Chicago River & Indiana R. R., 353 U.S. 30 (1957) 10, 11
Burlington N. R.R. v. UTU, 848 F.2d 856 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 499 (1988) 7
Chicago & N.W. Ry. v. UTU, 402 U.S. 570 (1971) .. 10
Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) 19
Ellerd v. Southern Pac. R. R., 241 F.2d 541 (7th Cir. 1957) 20
Ex Parte 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table) 4, 11
Garland Coal & Mining Co. v. United Mine Workers, 778 F.2d 1297 (8th Cir. 1985) 16
Goldberg v. Kelly, 397 U.S. 254 (1970) 20
John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) 15, 16
Knox & Kane R.—Exemption, 366 I.C.C. 439 (1982) 13
Local No. 381, Int'l Union of Operating Engin'rs. v. Tosco Corp., 823 F.2d 265 (8th Cir. 1987) 16
Nolde Bros. Inc. v. Bakery Workers, 430 U.S. 243 (1977) 8, 13, 15, 16

TABLE OF AUTHORITIES—Continued

Page

Nord v. Griffin, 86 F.2d 481 (7th Cir. 1936) 20
Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) 19
Pittsburgh & Lake Erie R. R. v. RLEA, 491 U.S. —— (1989) ..... *passim*
Railway Clerks v. Florida E.C. R.R., 384 U.S. 238 (1966) 12
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 18
Rio Grande Indus., Inc.—Purchase and Trackage Rights—Chicago, Missouri & W. Ry. Line Between St. Louis, Mo. and Chicago, IL, 5 I.C.C. 2d 952 (1989) 21
RLEA v. Chicago & N.W. Transp. Co., 848 F.2d 102 (8th Cir. 1988), *vacated*, 109 S. Ct. 3207 (1989), *on remand*, 890 F.2d 1024 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 3237 (1990) 7
Smith v. Hoboken R. R., Warehouse and S.S. Connecting Co., 328 U.S. 123 (1948) 16
St. Joe Paper Co. v. Atlantic Coast Line R.R., 347 U.S. 298 (1954) 22

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER MATERIALS:

U.S. CONST.
amend v ..... *passim*
Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* ..... *passim*
Section 10505, 49 U.S.C. § 10505 ..... 2, 3, 10, 11
Section 10901, 49 U.S.C. § 10901 ..... *passim*
National Labor Relations Act, 29 U.S.C. § 151, *et seq.* 13
Railway Labor Act, 45 U.S.C. § 151, *et seq.* ..... *passim*
Section 1 First, 45 U.S.C. § 151 First 4, 16
Section 2 First, 45 U.S.C. § 152 First ..... *passim*
Section 3 First (i), 45 U.S.C. § 153 First (i) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Staggers Rail Act of 1980, Pub. L. No. 96-448, 98 Stat. 174	13
Hearings on Rapid Growth of Short Lines Before the Subcomm. on Energy and Commerce, 100th Cong., 1st Sess. (1987) (Statement of H. J. Gradison)	13
Oversight Hearings on Staggers Rail Act Before the Subcomm. on Transp. of the House Comm. on Energy and Commerce, 100th Cong. 1st Sess. (1987) (Statement of H. J. Gradison)	13-14
78 Cong. Rec. 11718 (June 15, 1934) (Statement of Rep. Mead)	11
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	7
28 U.S.C. § 2101(c)	2

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Transportation•Communications International Union [hereinafter, "TCU"] respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review an opinion entered on September 20, 1990 in *MT Properties, Inc. v. Transportation•Communications International Union*, 914 F.2d 1083 (8th Cir. 1990).

OPINIONS BELOW

The opinion of the court of appeals for the Eighth Circuit is reported at 914 F.2d 1083 and is reprinted as Appendix A at 1a. The unreported decision of the United States District Court for the District of Minnesota (Renner, J.) was entered on January 11, 1989, and is reprinted as Appendix B at 23a. The unreported

judgment of the district court was entered on January 20, 1989, and is reprinted as Appendix C at 32a.

JURISDICTION

The decision of the court of appeals was entered on September 20, 1990, and petitioner's timely request for rehearing and suggestion for rehearing *en banc* was denied on October 31, 1990. Appendix E at 33a. This petition is thus timely under 28 U.S.C. § 2101(c). Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the relationship between two Acts of Congress which regulate aspects of interstate commerce—*i.e.*, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, as well as the implications of the appellate court's construction of the two Acts under the Due Process and Just Compensation clauses of the Fifth Amendment of the Constitution of the United States. U.S. CONST. amend. V. In particular, this case involves the impact of Sections 10505 and 10901 of the Interstate Commerce Act, 49 U.S.C. §§ 10505 and 10901, on the obligations imposed upon carriers by Section 2 First and Section 3 First (i) of the Railway Labor Act, 45 U.S.C. §§ 152 First and 153 First (i), and the Fifth Amendment implications of that impact. Those statutory provisions, as well as the Fifth Amendment of the Constitution of the United States, are set forth in Appendix E at 34a-49a.

STATEMENT OF THE CASE

This case arises out of the TCU's efforts to compel arbitration under the arbitration provisions of two collective bargaining agreements between the TCU and respondent MT Properties, Inc. [hereinafter, "MT Prop-

erties"] which the TCU asserts applied to respondent MT Properties' lease of tracks and operating properties to Minnesota Commercial Railway Company [hereinafter, "MCRC"]. The two agreements, the Washington Job Protection Agreement of 1936 [hereinafter, "WJPA"] and the February 7, 1965 Stabilization Agreement [hereinafter, "February 7 Agreement"], have been in existence for more than a half century and a quarter century, respectively, and cover almost all rail carriers in the nation.

The lower courts' failure to enforce the TCU's statutory and contractual rights to arbitrate disputes arising under the WJPA and February 7 Agreement raise important issues concerning the scope of a railroad's duties under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, to arbitrate disputes arising out of collective bargaining agreements, where the need to arbitrate is caused by the carrier's decision to engage in an action exempt from regulation under the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* Also, this case concerns the deprivation of rail labor's contractual rights in contravention of the Due Process and Just Compensation clauses of the Fifth Amendment to the Constitution of the United States. Guidance from this Court is necessary to ensure that the mandatory arbitration provisions of the RLA and rail workers' rights under existing agreements are not effectively nullified whenever a carrier undertakes a transaction which is exempt from ICC regulation under Section 10505 of the ICA, 49 U.S.C. § 10505, and that such workers' Fifth Amendment rights are not, thereby, abridged.

A. The TCU's Efforts to Arbitrate

The Minnesota Transfer Railway Company [hereinafter, "Minnesota Transfer"] was formed over 100 years ago by several railroad companies to provide those railroads with terminal rail service in the Minneapolis-St. Paul metropolitan area. As of 1986, Minnesota Transfer

was wholly-owned by the connecting rail carriers and employed approximately thirty (30) employees, ten (10) of whom were represented by the TCU, to perform the terminal operations for the owning carriers. On December 11, 1986, Minnesota Transfer changed its corporate name to MT Properties, but continued to operate as Minnesota Transfer. Like its predecessor Minnesota Transfer, MT Properties is a "carrier" within the meaning of Section 1 First of the RLA. 45 U.S.C. § 151 First. App. A at 2a.

On February 1, 1987, MCRC, a newly-formed carrier, acquired through a 50-year lease the rail assets of MT Properties, which is owned by three rail carriers—*i.e.*, the Burlington Northern Railroad, the Chicago & North Western Transportation Company, and the Soo Line Railroad. In conjunction with the leasing of its rail assets, MT Properties abolished the positions of ten (10) employees who are represented by the TCU. App. A at 2a.

In acquiring MT Properties' rail assets, MCRC utilized the exemption procedures established in *Ex Parte 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986), *review denied sub. nom. Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table) [*"Ex Parte 392"*]. *See Pittsburgh & Lake Erie R. R. v. RLEA*, 491 U.S. —— (1989), slip op. at 5-8. In accordance with *Ex Parte 392*, which exempts new carriers engaging in Section 10901 transactions from compliance with the prior approval requirements of § 10901, the exemption became effective on February 27, 1987. App. A at 3a. The ICC, which has stated that it will impose employee protective conditions on Section 10901 transactions "only in exceptional situations" (*Pittsburgh & Lake Erie*, slip op. at 7 n.9), declined to exercise its discretion to impose employee protective conditions in the lease transaction. *Id.*

In January 1987, prior to MCRC's acquisition of MT Properties' rail assets, TCU representatives filed claims

for protective benefits on behalf of its members under the WJPA and the February 7 Agreement. Joint Appendix [hereinafter, "J.A."] at 23, in 8th Cir. No. 89-5061. The TCU claimed that the lease transaction between MT Properties and MCRC constituted a "coordination" within the meaning of the WJPA and a "technological, operational and organizational" change within the meaning of the February 7 Agreement, such that those agreements and the protections provided therein are applicable to the TCU-represented employees. Section 2(a) of the WJPA defines a coordination as a "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities." J.A. at 54. Under Article III, Section 1 of the February 7 Agreement, carriers were given the "right to make technological, operational and organizational changes" and to "transfer work and/or transfer employees" in exchange for employee protective benefits guaranteed to all employees who qualified under that agreement. J.A. at 67.

In February 1987, the Burlington Northern Railroad, acting on behalf of MT Properties, informed the TCU that the claims were denied on the grounds that TCU was wrong in asserting that the WJPA and February 7 Agreement applied and protected the employees. MT Properties reasserted its position at a March 1987 conference between the TCU and MT Properties. J.A. at 23.

In November 1987, the TCU notified the National Railway Labor Conference [hereinafter, "NRLC"], which is MT Properties' designated representative under the WJPA and the February 7 Agreement, of its invocation of the services of the NRLC's Disputes Committee to resolve the dispute between the TCU and MT Properties concerning the interpretation and application of the

WJPA and the February 7 Agreement.[1] The NRLC referred the matter to a special board of adjustment established pursuant to Section 3 Second of the RLA. App. A. at 3a-4a.

Respondent MT Properties' reaction to the TCU's invocation of its statutory and contractual right to arbitrate the dispute was to file suit in United States District Court for District of Minnesota seeking a declaratory judgment that the special board of adjustment lacked jurisdiction to arbitrate the dispute and a permanent injunction prohibiting the TCU from pursuing the application of any contractual employee protective obligations on MT Properties as a result of the acquisition. The TCU counterclaimed seeking a declaratory judgment that MT Properties is obligated under Sections 2 First and 3 First (i) of the RLA to arbitrate the claims presented by the TCU to the special board of adjustment.

B. The District Court Decision

On January 11, 1989, prior to this Court's decision in *Pittsburgh & Lake Erie*, the district court granted MT

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[1] Article VII, Section 1 of the February 7 Agreement provides for arbitration of any dispute concerning the interpretation or application of the terms of the agreement (J.A. at 72):

> Any dispute involving the interpretation or application of any of the terms of this agreement and not settled on the carrier may be referred by either party to the dispute for decision to a committee . . . . Decisions so arrived at shall be final and binding upon the parties to the dispute.

Likewise, section 13 of the WJPA provides that disputes involving interpretation, application or enforcement of the WJPA may be referred to arbitration by either party (J.A. at 60):

> In the event that any dispute or controversy arises . . . in connection with a particular coordination, including an interpretation, application or enforcement of any of the provisions of this agreement . . . which is not composed by the parties thereto within thirty days after same arises, it may be referred by either party for consideration and determination to Committee. . . .

Properties' motion for a declaratory judgment that jurisdiction of the special board of adjustment is superseded by the ICA and denied MT Properties' request for a permanent injunction. The district court found that an exemption from ICC regulation under Section 10505 of the ICA "supersedes the jurisdiction of the Special Board, which is solely a creation of the Railway Labor Act to act under the arbitration provisions of that particular act." [2] App. B at 30a.

The TCU appealed to the Eighth Circuit from the judgment granting MT Properties' request for a declaratory judgment. The TCU invoked the appellate court's jurisdiction under 28 U.S.C. § 1291.

C. Court of Appeals' Decision

In affirming the district court's decision, the appellate court relied upon this Court's decision in *Pittsburgh & Lake Erie*, but found that the ICA requires that the mandatory arbitration provisions of the RLA are inapplicable once the ICC's exemption became effective. Specifically, the appellate court found that the ICA interests should prevail in reconciling what it perceived to be a conflict between a carrier's duties under Section 2 First and Section 3 First (i) of the RLA, 45 U.S.C. §§ 152 First, 153 First (i), and the ICA: "The competing statutory interests are reconciled in this case by enforcing the employees' rights until the *Ex Parte 392* exemption became effective, after which the ICA obligations were controlling." App. A at 13a. Accordingly, the court held that MT Properties had a statutory duty to arbitrate concerning the "effects of the lease transfer and not the decision of transfer itself" and that such duty existed only between

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[2] In reaching that result, the district court relied on *Burlington Northern R. R. v. United Transportation Union*, 848 F.2d 856 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 499 (1988). However, the reasoning of that decision was reconsidered and rejected by the Eighth Circuit following this Court's ruling in *Pittsburgh & Lake Erie*. *See RLEA v. C&NW*, 890 F.2d 1024 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 3237 (1990).

January 21, 1987, the date MT Properties agreed to sell its rail assets to MCRC, and February 27, 1987, the date the ICC exemption became effective.[3] App. A at 12a.

The appellate court rejected the TCU's argument that the district court's construction of the interrelationship between the ICA and Sections 2 First and 3 First (i) of the RLA would deprive rail employees of both their contractual rights to arbitrate disputes under the WJPA and the February 7 Agreement and the financial compensation provided for therein in contravention of the Fifth Amendment. In rejecting the TCU's constitutional arguments, the court compounded its error by interpreting both the WJPA and February 7 Agreement to determine that, based upon its assessment of the merits of the dispute, the WJPA and February 7 Agreement did not apply to the acquisition.[4] The Eighth Circuit found that the instant case is distinguishable from the cases cited by the TCU in support of the proposition that the

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[3] In finding that the TCU's right to arbitrate was "extinguished," the appellate court attached significance to the fact that the ICC exemption became effective in February 1987, and the TCU requested arbitration after the effective date of the exemption in November 1987. App. A at 12a. However, this Court has stated that the time of filing a claim is not relevant to its arbitrability: "the fact that the Union asserted its claim to severance pay shortly after, rather than before, contract termination does not control the arbitrability of that claim." *Nolde Bros. Inc. v. Bakery Workers*, 430 U.S. 243, 252 (1977).

[4] With regard to its interpretation of the WJPA, the appellate court found that MT Properties "had no duty to arbitrate under the WJPA because no *coordination* between two or more *carriers* has occurred." App. A at 17a. Likewise, the court found that MT Properties had no duty to arbitrate under the February 7 Agreement because the carrier's "decision to lease its assets and leave the railroad business entirely does not constitute a technological, operational, or organizational change within the meaning of the agreement." App. A at 18a. Petitioner TCU, in its request for rehearing, and earlier in its briefs, had argued that the question of whether the lease and acquisition was a "coordination" under the WJPA or an "operational change" under the February 7 Agreement were the ultimate issues to be decided by the arbitrators.

ICC has no authority to abrogate existing collective bargaining agreements,[5] because in those cases, "explicit provisions of collective bargaining agreements were clearly violated." App. A at 19a.

On October 31, 1990, the court denied a timely motion for rehearing and a suggestion for rehearing *en banc*, and this petition for a writ of certiorari has followed.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the proper interpretation of the duty to arbitrate disputes under the mandatory arbitration provisions of the RLA and under existing collective bargaining agreements, as well as the Fifth Amendment implications of governmental action which relieves rail carriers from their obligations under private contracts. Resolution of this controversy over the proper interpretation of the mandatory arbitration provisions of the RLA clearly transcends the instant dispute concerning the abrogation of rail labor's accrued rights under the WJPA and the February 7 Agreement. Rather, resolution of this controversy directly impacts the viability of arbitration provisions in *all* collective bargaining agreements in the rail industry when disputes arise over transactions exempt from ICC approval or transactions approved by that agency. Moreover, while the contracts at issue in this action happen to be collective bargaining agreements, the appellate court's holding would permit a railroad engaging in an exempt transaction to absolve itself of any responsibility under private contracts with bondholders, creditors, shippers or any other party that does business with the rail carrier.

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[5] *Brotherhood of Railway Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989), *cert. granted sub nom. Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 110 S. Ct. 1522 (1990); and *Ass'n of Flight Attendants v. Delta Air Lines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990).

I. THIS CASE PRESENTS IMPORTANT ISSUES OF FEDERAL LAW, FOR THE PROPER INTERPRETATION OF THE RAILWAY LABOR ACT'S MANDATORY ARBITRATION PROVISIONS ARE CRUCIAL TO THE EFFECTIVE ADMINISTRATION OF THAT ACT

The requirement under Section 2 First of the RLA that carriers and rail unions "exert every reasonable effort to make and maintain agreements" is "more than merely hortatory," but rather is an enforceable "legal obligation." *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 576-77 (1971). Despite the clear congressional mandate in Sections 2 First and 3 First (i) of the RLA that *all* disputes arising under collective bargaining agreements be submitted to adjustment boards, the Eighth Circuit has found that the carrier's legal obligations under Sections 2 First and 3 First (i) of the RLA are superseded by Section 10505 of the ICA. While purportedly relying upon the "framework" set forth in *Pittsburgh & Lake Erie* for "reconciling competing objectives and statutory regimes of the ICA and the RLA when they conflict" (App. A at 11a), the appellate court has found a conflict where none existed between Sections 2 First and 3 First (i) of the RLA and Section 10505 of the ICA by exalting an ICC policy over a congressional mandate. Indeed, any alleged conflict between the mandatory arbitration provisions of the RLA and the ICA is a conflict of the appellate court's own making.

This Court has long recognized that the statutory duty to arbitrate disputes arising out of collective bargaining agreements would be "rendered meaningless" if an adjustment board "could act only if the union and the carrier were amenable to its doing so." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 35 (1957). Before the RLA was amended in 1934 to mandate that carriers and unions submit disputes concerning the interpretation of agreements to adjustment boards, the actual practice for dispute resolu-

tion in the railroad industry was in "marked contrast" to the "declared purpose" of the RLA, which is "to settle all disputes, whether arising out of the application of . . . agreements or otherwise, in order to avoid any interruption to commerce . . ." (Section 2 First). 353 U.S. at 36. Indeed, Congress amended the 1926 Act in 1934 to ensure that carriers, like MT Properties, do not impede the dispute resolution process provided for in the RLA (78 Cong. Rec. 11718 (1934) (Remarks of Rep. Mead)):

> This bill amends the Railway Labor Act passed in 1926. The original act was drawn up on the assumption that the railroad companies intended to cooperate with their employees in adjusting disputes, as they professed a desire to do so. In actual practice, however, such cooperation has frequently not been forthcoming. The carriers have refused to set up adjustment boards and often have otherwise blocked the establishment of impartial tribunals to which the workers might bring their complaints. In some cases, they have disregarded the decisions of such boards as have been created.

As observed by this Court in *Chicago River*, the legislative history of the 1934 amendments to the RLA clearly demonstrates that Congress intended that *all* grievances, no matter how meritless the carrier might claim they are, would be submitted to adjustment boards. *See*, 353 U.S. at 37-38.

Nothing in the language or purpose of Section 10505 of the ICA purports to exempt a rail carrier engaging in a Section 10901 transaction from its statutory duty under the RLA to submit disputes to an adjustment board. Indeed, the Commission exercised its authority under Section 10505 and granted in *Ex Parte 392* a class exemption for Section 10901 transactions, because the ICC found that regulation under the ICA is "not necessary to carry out the transportation policy" of the ICA. 49 U.S.C. § 10505(a). While *Ex Parte 392* and 49 U.S.C. § 10505 are "aimed at reversing the rail industry's decline

through deregulatory efforts, above all by streamlining procedures [under the ICA] to effectuate economically efficient transactions" (*Pittsburgh & Lake Erie*, slip op. at 18), this Court has recognized that "the ICC has simply granted an exemption from the strictures of § 10901, which permitted, but did not order, the consummation" of the transaction. *Id.* at 19 n.18.

Unlike the bargaining and status quo provisions contained in Sections 2 Seventh and 6, of the RLA, 45 U.S.C. §§ 152 Seventh and 156,[6] the arbitration provisions in no way impede the managerial prerogative to go out of the railroad business. In *Pittsburgh & Lake Erie*, this Court noted that the status quo provisions of Section 6 of the RLA, if applicable, would have prohibited the carrier from going forward with the 10901 transaction pending the completion of the "purposely long and drawn out" procedures that the Act requires be followed in order to settle a major dispute. *Pittsburgh & Lake Erie*, slip op. at 11, quoting *Railway Clerks v. Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966). However, in *Pittsburgh & Lake Erie*, this Court construed the obligations of the carrier under the bargaining and status quo provisions of the RLA to avoid finding a statutory roadblock to the managerial prerogative of going out of the railroad business (*Id.* at 16):

> [T]he decision to close down a business entirely is so much a management prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this case. Absent statutory direction to the contrary, the decision of a railroad to go out of business and consequently, to re-

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[6] *See Pittsburgh & Lake Erie*, slip op. at 17, where this Court construed the bargaining and status quo provisions of the RLA to "avoid conflicts between two statutory regimes, namely, the RLA and ICA, that in some respects overlap."

duce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provisions of § 156.

In contrast to the bargaining and status quo provisions of the RLA, the mandatory arbitration provisions of that statute, like contractual arbitration commitments under the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, do not interfere with the managerial prerogative to go out of the railroad business since a statutory or contractual obligation to arbitrate disputes arising under agreements can be satisfied *after* consummation of a Section 10901 transaction. *See, Nolde Bros. Inc. v. Bakery Workers*, 430 U.S. 243 (1977). While existing contracts may make certain Section 10901 transactions less financially desirable, it is the contractual commitments that employers have incurred under the agreements which they have voluntarily executed, and not the statutory duty to arbitrate, that makes the transactions less financially desirable.[7]

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[7] In finding that the mandatory arbitration provisions of the RLA are superseded by the ICA, the Eighth Circuit looked to a policy, which was developed by the ICC based on that agency's view of the purpose behind the Staggers Rail Act of 1980, Pub. L. No. 96-448, 98 Stat. 174, to find a conflict between the two Acts. The genesis of the ICC's policy occurred less than ten (10) years ago, when, apparently in the spirit of deregulation, the ICC altered its long-standing policy of requiring a railroad, planning to sell a portion of its system to a newly-formed railroad for continued operations, to provide a "fair arrangement" to protect the interests of its employees. *Knox & Kane R.—Exemption*, 366 I.C.C. 439 (1982). Since that decision, railroads have embraced the practice of selling marginal lines to short line and regional operators, most of which are newly-formed carriers.

However, the short line policy, which was adopted by the ICC and utilized by MCRC, was not designed by Congress. Rather, as former ICC Chairperson Heather J. Gradison has explained, the ICC's short line policy was a "surprise" and an "unexpected gain out of deregulation." *Hearings on Rapid Growth of Short Lines, Before Subcommittee on Energy and Commerce*, 100th Cong., 1st Sess. at 69 (1987) (Statement of H. J. Gradison); *Oversight Hear-*

It is important that this Court clarify that *Pittsburgh & Lake Erie* applies only to the mandatory bargaining provisions of the RLA in entire line sales. Additionally, this Court should make it clear that there is simply no conflict between the RLA mandatory arbitration provisions and the ICA so that federal courts do not rely on *Pittsburgh & Lake Erie* to find that the arbitration provisions of the RLA are superseded by the ICA especially in circumstances where, as here, the ICA has declined to regulate a transaction. In light of the "minimal importance" of Section 10901 transactions and the extreme importance of the arbitration provisions in the RLA to the administration of the RLA, this Court should review and vacate the appellate court's decision so that the intent of both federal statutes—the RLA and the ICA—will be effectuated.

This case involves far more than labor agreements, for the validity of all private contracts between rail carriers and other parties is clearly jeopardized by the appellate court's decision. Under the appellate court's rationale, the right to arbitrate a dispute arising under any contract, including commercial contracts, would be extinguished on the effective date of an ICC exemption if the contract imposed a post-transaction financial liability on a carrier engaging in a Section 10901 entire line transaction.[8] Thus, any contractual obligation that could render a Section 10901 transaction "unprofitable" would be nullified under the Eighth Circuit's decision. App. A at 14.

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ings on Staggers Rail Act, Before Subcommittee on Transportation of House Committee on Energy and Commerce, 100th Cong., 1st Sess. at 425 (1987) (Statement of H. J. Gradison).

[8] The issue of whether a carrier engaging in a transaction regulated under Section 11343(a) of the ICA, 49 U.S.C. 11343(a), is exempt from collective bargaining agreement obligations by virtue of the provisions of 49 U.S.C. 11341(a), is currently before this Court in the consolidated cases of *Norfolk and Western Railway Company et al. v. American Train Dispatchers Association*, No. 89-1027, and *CSX Transportation, Inc. v. Brotherhood of Railway Carmen et al.*, No. 89-1028.

II. THE EIGHTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS CONCERNING THE RAILWAY LABOR ACT IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS IN *WILEY* AND *NOLDE* AND THE DECISION OF ANOTHER CIRCUIT COURT

This Court has previously addressed the issue of whether an employer is obligated to aribtrate under a collective bargaining agreement following the sale of its entire business, both where the business continues to exist and where the business ceases. *Nolde Bros. Inc. v. Bakery Workers*, 430 U.S. 243 (1977) [hereinafter, "*Nolde*"]; *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) [hereinafter, "*Wiley*"]. In *Wiley* and *Nolde*, while considering the commands of the National Labor Relations Act, this Court found that an employer is not relieved of an existing duty to arbitrate by engaging in transactions that affect ownership of the entity, even if the collective bargaining agreement has expired. The reason that this Court has found that certain contractual rights, including the contractual right to arbitrate a dispute, survive the expiration of the agreement under which the employees' rights have accrued is that it would derogate from the federal policy of settling labor disputes by arbitration if a "change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established . . . ." 376 U.S. at 549. Petitioner submits that whether the same result should be held to exist under the Railway Labor Act presents an important issue of law which should be decided by this Court.

The appellate court's holding that MT Properties' statutory and contractual duty to arbitrate ceased once the ICC exemption became effective clearly conflicts with this Court's decisions in *Nolde* and *Wiley*, especially since in this case, the agreements under which the TCU has sought to invoke arbitration have not expired and MT

Properties has not gone out of the railroad business.[9] Moreover, unlike MT Properties, which has a statutory as well as a contractual duty to arbitrate, the employers' duty to arbitrate in *Wiley* and *Nolde* was purely contractual. Ironically, if the appellate court's decision is not vacated, rail employees who in all other circuits are protected by both a statutory and a contractual right to arbitrate, will have less protection than employees whose right to arbitrate is simply a "creature" of collective bargaining agreements. *Nolde*, 430 U.S. at 250.

The Eighth Circuit's decision also conflicts with a decision arising under the Railway Labor Act by the United States Court of Appeals for the District of Columbia Circuit, *Ass'n of Flight Attendants v. Delta Air Lines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990).[10] In that case, the D.C. Circuit found that although the Association of Flight Attendants ceased to be the representative of the employees under Section

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[9] MT Properties remained a "carrier" within the meaning of Section 1 First of the RLA, 45 U.S.C. 151 First, after the lease transaction because a railroad's status as a carrier under the RLA must be considered in tandem with the carrier's obligations under the ICA. 45 U.S.C. § 151 First. Since MT Properties has not only a right but an absolute obligation to operate the rail service itself or contract with another entity to operate the services in the event that MCRC ceases operation of the leased lines, MT Properties did not go out of the railroad business—it is still a rail carrier. *See Smith v. Hoboken R. R., Warehouse and Steamship Connecting Co.*, 328 U.S. 123, 129 (1948). Moreover, the three rail carriers that own MT Properties—Burlington Northern Railroad, the Chicago & North Western Transportation Company, and the Soo Line Railroad—remain in the railroad business.

[10] This case also involves an intracircuit conflict. In accordance with this Court's decision in *Nolde*, the Eighth Circuit has previously found that a seller of an entire business has a duty to arbitrate with the unions two grievances that arose out of the sale of the seller's business *after* the sale. *Local No. 381, International Union of Operating Engineers v. Tosco Corporation*, 823 F.2d 265 (8th Cir. 1987); *see also Garland Coal & Mining Co. v. United Mine Workers*, 778 F.2d 1297 (8th Cir. 1985).

2 Ninth of the RLA, 45 U.S.C. § 152 Ninth, following the merger of Western Airlines, Inc. [hereinafter, "Western"] into Delta Air Lines, Inc., [hereinafter, "Delta"], the duty to arbitrate whether Western breached the successorship clause of its collective bargaining agreement with AFA by failing to bind Delta to the collective bargaining agreement, continued to exist after the merger. In stark contrast to the Eighth Circuit's decision, the D.C. Circuit specifically rejected the argument that the requirement of post-merger liability for damages under collective bargaining agreements might cause a carrier to forego an otherwise desirable merger; as the *Flight Attendants* court stated (879 F.2d at 917):

> The most that can be said in support of Delta's position is that if a carrier were liable in damages for breach of the successorship clause in its CBA, it might forego entering into an otherwise desirable merger.
>
> Delta has pointed us to nothing in the language, the legislative history, or even the spirit of the RLA to suggest that Congress . . . intended to remove barriers to economically efficient merger activity on the part of airline carriers. *Cf.* 49 U.S.C. § 11341(a) (exempting railroad mergers from, *inter alia*, the antitrust laws). In the absence of such an indication, we decline to hold, in the context of the threshold jurisdictional issue now before us, that a bargained-for successorship clause creates no legal rights or duties whatsoever. . . .

In light of the conflict with the reasoning in decisions of this Court and of the D.C. Circuit, guidance from this Court is necessary to ensure that rail and airline carriers, as contrasted with all other employers, are not relieved of obligations embodied in private contracts when such entities exercise their right to change their corporate structure or ownership.

III. WHETHER THE EIGHTH CIRCUIT'S INTERPRETATION OF THE 'INTERRELATIONSHIP BETWEEN THE RLA AND THE ICA HAS DEPRIVED EMPLOYEES OF CONTRACTUAL RIGHTS IN VIOLATION OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES PRESENTS AN IMPORTANT QUESTION OF LAW

The appellate court's interpretation of the interrelationship between Sections 2 First and 3 First (i) of the RLA and Section 10901 of the ICA threatens to deprive contracting parties of contractual rights without due process of law, and without just compensation, in contravention of the Due Process and Just Compensation clauses of the Fifth Amendment. U.S. CONST. amend. V. Since the two Acts can be read in such a manner as to avoid a violation of the Fifth Amendment, this Court should review the appellate court's decision so that its constitutionally infirm construction is rejected. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974).

This case, petitioner submits, is a quintessential example of the very purpose of the constitutional prohibition against uncompensated takings of private property for public use, which is "to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Assuming *arguendo* that the transactions exempted from ICC regulation provide a public, and not simply a private benefit, whether or not the ten (10) TCU-represented rail workers who lost their jobs when MT Properties consummated the lease transactions, can be stripped of accrued property rights under existing agreements without any compensation presents an important question of law which should be addressed by this Court.

There is no doubt that substantial private property interests are at stake in this case, and that the appellate

court's finding that the ICC exemption supersedes the statutory duty to arbitrate will, unless its decision is vacated, have a grave "economic impact" on the TCU-represented employees and will deprive them of rights to which they had a distinct expectancy. *Connolly v. Pension Benefit Guaranty Corp.* 475 U.S. 211, 225 (1986), *quoting, Penn Central Transportation Co. v. New York City*, 438 U.S. 109, 124 (1978). Indeed, but for the court's erroneous reading of the relationship between the RLA and ICA, such employees would have had the statutory and contractual right to arbitrate over their entitlement to employee protective benefits that the TCU claims accrued to them under existing agreements.[11]

The Fifth Amendment's Due Process guarantees, petitioner submits, prohibits an exemption from ICC regulation from being used to deprive employees, or any third party for that matter, of remedies and rights embodied in contracts, especially where, as here, the employees have no voice in deciding whether to accept or reject the ICC's permissive regulatory approval. Indeed, the fundamental unfairness of depriving employees of statutory and contractual remedies is self-evident where the government sanctions a carrier's unilateral decision to undertake a transaction through which it can nullify agreements that were bargained for by third parties, including rail unions. Since due process protections clearly attach to governmental action which deprives individuals of valuable property interests without a hearing, it is clear that the stripping away of a statutory and bargained for

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[11] *E.g.*, Section 7(a) of the WJPA provides that any employee of "any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination shall be accorded an allowance . . . based on length of service" which shall be a "monthly allowance equivalent in each instance to sixty percent (60%) of the average monthly compensation of the employee in question during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the coordination." J.A. at 56.

remedy to enforce those rights also violates the right to due process. *Goldberg v. Kelly*, 397 U.S. 254 (1970).[12]

In this case, the appellate court's error in concluding that an ICC exemption abrogated the employees' contractual rights was compounded by the court's improper usurpation of the arbitrator's role in resolving the dispute between the parties to find that the Fifth Amendment was not violated here. Even though the two agreements require MT Properties to participate in adjustment board proceedings to resolve disputes "growing . . . out of the interpretation or application" of the two collective bargaining agreements (45 U.S.C. 153 First (i)), the court nevertheless determined " 'with positive assurance that the arbitration clause[s were] not susceptible of an interpretation that covers the asserted dispute.' " App. A at 17a, *quoting AT&T Technologies v. CWA*, 475 U.S. 643 (1986). However, that determination was made only after the court considered the *merits* of the disputes. In assessing the merits of the TCU's claims, the Eighth Circuit ignored this Court's admonition that (475 U.S. 649-50) (citation omitted):

> [I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective bargaining agreement is to be decided, not by the

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[12] The deprivation of the right to submit disputes to an adjustment board clearly implicates Fifth Amendment interests since federal courts have long held that the manner in which adjustment boards process disputes is entitled to due process protections. *See Nord v. Griffin*, 86 F.2d 481 (7th Cir. 1936) (award of National Railroad Adjustment Board violated Fifth Amendment rights of employee where employee was not a party to the proceeding and had no notice of hearing and where "unavoidable effect of award was loss of established seniority rights"). *See also Barrett v. Pennsylvania-Reading Seashore Lines*, 245 F.2d 579 (3rd Cir. 1957); *Ellerd v. Southern Pac. R.R. Co.*, 241 F.2d 541 (7th Cir. 1957).

> court asked to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious."

Thus, the court's deprivation of the TCU-represented employees' Fifth Amendment rights not only involved the appellate court's construction of the interrelationship of the RLA and ICA but also its usurpation of the role of the arbitrator.

The question of whether rail carriers will in the future be permitted, by virtue of the Eighth Circuit's decision, to take property owned by financial institutions, shareholders, shippers, and individual rail workers, for their own private benefit is vitally important to the stability of the railroad industry. The threat to the financial stability of an industry, which has suffered the effects [13] throughout the 1980's of rail financial restructurings and grossly undercapitalized acquisitions, is particularly grave under the precedent established by the Eighth Circuit in this case, for that decision is applicable to *any* contractual obligation of a rail carrier. Indeed, a carrier need only utilize the ICC class exemption for Section 10901 transactions to seek relief from obligations under bank loans, under contracts with shippers, or

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[13] For example, in *Rio Grande Industries, Inc. et al.—Purchase and Trackage Rights—Chicago, Missouri & Western Railway Company Line Between St. Louis, MO and Chicago, IL*, 5 I.C.C.2d 952, 989 (1989) the ICC found that the Chicago, Missouri & Western Railway Company, a grossly undercapitalized railroad which was created in 1987 during the heyday of junk bonds and which filed for bankruptcy in 1988, was by 1989 "on the edge of liquidation" and that "any delay" in the sale of its rail assets "could well result in a whole line abandonment."

under other private contracts that may become less desirable to carriers as economic conditions fluctuate. Thus, the appellate court's decision paves the way for future government inaction—ICC exemptions—to be used to deprive parties who have or will enter into contracts with railroads of the financial benefits for which the parties have bargained.

The net effect of the appellate court's decision will be, if the judgment is not reviewed and then vacated, to expand upon the jurisdiction of the ICC in a manner Congress never intended.[14] It would defy logic to conclude that the *sub silentio* effect of Section 10505 of the ICA is to empower the ICC to grant rail carriers on an industry-wide basis the right to take private property for their own benefit whenever the carriers are economically motivated to do so.

Petitioner respectfully submits that whether such a construction of the ICA is consistent with the Fifth Amendment is an important issue of federal law which has not been, but should be, considered by this Court.

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[14] *See St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 305 (1954), where this Court found that Congress would not have acted *sub silentio* to permit the Commission to impose merger and consolidations on railroads since Congress was concerned about the "disadvantages" that such "far-reaching revampings" would have on employees, investors, shippers, and communities served by the merged railroad. According to this Court, investors in one railroad would find, "contrary to their expectations," that their holdings had been transmuted into the securities of a different railroad. *Id.*

CONCLUSION

This Court should grant the writ to bring the decision of the Eighth Circuit before this Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5061

MT PROPERTIES, INC.,
Appellee,

v.

TRANSPORTATION-COMMUNICATIONS
INTERNATIONAL UNION,
Appellant.

Appeal from the United States District Court
for the District of Minnesota

Submitted: December 13, 1989

Filed: September 20, 1990

Before McMILLIAN, JOHN R. GIBSON and BOWMAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Transportation-Communications International Union (TCU) appeals from a final order entered in the United States District Court[1] for the District of Minnesota, granting MT Properties, Inc.'s (MT) motion for summary judgment. The district court issued a declaratory judgment that the Special Board of Adjustment estab-

[1] The Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

lished pursuant to the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982 & Supp. V 1987) (RLA), lacked jurisdiction under the Washington Job Protection Agreement of 1936 (WJPA) or the Job Stabilization Agreement of February 7, 1965 (Stabilization Agreement) to arbitrate a dispute between TCU and MT. For reversal, TCU argues that the district court erred in holding that MT was relieved of its duty to arbitrate, and, assuming MT was relieved of this duty, the employees represented by TCU were deprived of contractual rights without just compensation in violation of the fifth amendment. We affirm the order of the district court, but for different reasons than those relied on below.

I.

The Minnesota Transfer Railway Co. (Minnesota Transfer) was formed over 100 years ago by several rail companies to operate terminal rail service in the Minneapolis-St. Paul metropolitan area. As of 1986, Minnesota Transfer employed approximately 30 employees, 10 of whom were represented by TCU. On December 11, 1986, Minnesota Transfer changed its corporate name to MT Properties, Inc., but continued to operate as Minnesota Transfer. Like its predecessor Minnesota Transfer, MT was a "carrier" within the meaning of the RLA. *See* 45 U.S.C. § 151 First.

On February 1, 1987, all of MT's rail assets were acquired through a 50 year lease (the acquisition) by the Minnesota Commercial Railway Co. (MCRC). After the acquisition, MT merged with the St. Paul Union Depot Co. The surviving company kept the name of MT Properties, Inc.[2] In conjunction with leasing its rail assets, MT eliminated its rail operations and abolished all 30 rail-connected jobs, including the jobs of the 10 employees

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[2] The surviving company also kept "Minnesota Transfer" as its operating name.

represented by TCU. MT is now solely a real estate holding company.

The Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982 & Supp. V 1987) (ICA) confers broad authority on the Interstate Commerce Commission (ICC) to regulate the railroad industry. At the time of the acquisition, MCRC applied for an exemption from the ICC's acquisition regulations pursuant to *Ex Parte 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 1 I.C.C. 2d 810 (1986) (*Ex Parte 392*), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987). *Ex Parte 392* exempts rail lines sales to new carriers from full compliance with ICC regulations, including those regulations which permit the ICC to impose labor protection conditions on transactions. MCRC's Application for Exemption was published in the Federal Register on February 20, 1987. The exemption became effective seven days after publication.[3] In accordance with the exemption, no labor protection conditions were imposed on the acquisition.

After the exemption, the Brotherhood of Maintenance of Way Employees (BMWE) filed a petition for revocation of the exemption with the ICC. The BMWE claimed that the acquisition constituted an abandonment and sale of a rail line between two carriers and argued that labor protection conditions should be imposed on the MT-MCRC transaction. The ICC denied BMWE's petition for revocation, stating that BMWE had not offered any evidence that the acquisition was a transaction between two carriers.

In a November 4, 1987, letter, TCU requested the National Railway Labor Conference (NRLC), MT's desig-

[3] The ICC modified the Ex Parte 392 procedures in 1988 to extend the waiting period from 7 to 35 days. *See* 53 Fed. Reg. 5981-82 (1988).

nated representative under the WJPA and the Stabilization Agreement, to order its Dispute Committee to decide the proper interpretation and application of the collective bargaining agreements. The NRLC referred the dispute to Special Board of Adjustment No. 605 (Special Board), an arbitration panel established pursuant to the RLA, the WJPA, and the Stabilization Agreement. Both sides have presented their respective positions to the Special Board.

MT subsequently filed suit in the United States District Court for the District of Minnesota, requesting a declatory judgment that the Special Board lacked jurisdiction and a permanent injunction prohibiting TCU from arbitrating this dispute under the WJPA and the Stabilization Agreement. Both sides moved for summary judgment. After hearing arguments, the district court granted MT's motion for summary judgment as to Count I on January 19, 1989, issuing a declaratory judgment that the Special Board had no jurisdiction under the WJPA or the Stabilization Agreement to resolve the dispute. The district court held that the ICC exemption issued pursuant to *Ex Parte 392* preempts the Special Board's jurisdiction to arbitrate this dispute under the RLA. This appeal followed.

II.

This case requires us to reconcile the competing statutory requirements and policy objectives of the RLA and the ICA in the context of a rail carrier's decision to transfer its assets by a long-term lease and leave the railroad business. TCU argues that the Supreme Court's recent decision in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989) (*Lake Erie*), controls this case and mandates reversal of the district court's order. TCU contends that the *Lake Erie* decision undercuts the district court's holding that the ICC exemption preempts the jurisdiction of the Spe-

cial Board. According to TCU, the district court's holding that the ICA supersedes the RLA is at variance with *Lake Erie*'s holding that the interests of the RLA and the ICA are to be harmonized to the fullest extent possible. TCU argues that *Lake Erie* provides a framework under which the employees' interest in arbitration under the RLA and the agreements must prevail. TCU further argues that the ICA does not give the ICC the authority to abrogate existing collective bargaining agreements when approving transactions. TCU also contends that if the analysis of the district court is upheld, the unionized employees will be deprived of property without compensation.

In response, MT claims that *Lake Erie* buttresses rather than undermines the district court's ruling that the ICC exemption strips the Special Board of jurisdiction. MT contends that its duty to arbitrate under the RLA was extinguished when MCRC was granted an exemption from ICC regulation several months before TCU declared its intent to arbitrate. While MT acknowledges that *Lake Erie* interpreted the RLA's mandatory bargaining provision rather than its arbitration provisions, MT argues that compelling policy reasons support extending *Lake Erie* to relieve railroads of their duty to comply with RLA arbitration obligations after an exemption from ICC regulation has been granted. MT further contends that even if *Lake Erie* is not dispositive, arbitration is not proper in the case because neither the WJPA nor the Stabilization Agreement apply to this case and the Special Board consequently has no contractual authority to hear the dispute.

A. Relationship Between ICA and RLA

In order to properly consider what becomes of the RLA duty to arbitrate after an exemption from regulation has been granted pursuant to *Ex Parte 392*, it is necessary to briefly examine the statutory frameworks of

the RLA and the ICA, the policy objectives of each, and how the statutes collide in the case before us. Congress has exercised its power under the commerce clause to regulate rail transportation for over a century and has granted the ICC plenary authority over rail transactions. *See Lake Erie*, 109 S. Ct. at 2596. For example, the ICC regulates rate and tariff increases, *see* 49 U.S.C. §§ 10701-10766, the construction and operation of rail lines, *see id.* § 10901, and railroads' proposed abandonments of rail lines, *see id.* § 10903. The ICA also provides for ICC regulation of proposed acquisitions of rail lines by noncarriers under Title 49 U.S.C. § 10901 (Section 10901). *See Railway Labor Executives' Ass'n v. United States*, 791 F.2d 994, 1003 (2d Cir. 1986) ("section 10901 governs single line acquisitions by noncarriers") (citing cases), *cert. denied*, 479 U.S. 1054 (1987). Under Section 10901(a)(3), a noncarrier may "acquire or operate an extended or additional railroad line only if the [ICC] finds that the present or future public convenience and necessity require or permit" the acquisition. Section 10901 sets forth the procedures for obtaining a certificate of public convenience and necessity, and Section 10901(e) permits the ICC to require the acquiring carrier "to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected" by the acquisition.

Because of increased competition, high costs, and extensive regulation, the railroad industry declined in the 1970s. In an effort to deregulate and revitalize the railroad industry, Congress enacted the Railroad Revitalization and Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 129, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 98 Stat. 174 (Staggers Act). The Staggers Act granted the ICC broad authority to exempt rail line acquisitions by noncarriers from the regulatory approval process in order to facilitate the acquisition and preservation of financially troubled rail lines. *See* 49 U.S.C.

§ 10505 (Section 10505). Pursuant to the authority conferred upon it by Section 10505, the ICC issued *Ex Parte 392*, which declared all noncarrier acquisitions presumptively exempt from Section 10901 regulation and provided that labor protection conditions would be imposed in individual cases only upon a showing of exceptional circumstances. *See Lake Erie*, 109 S. Ct. at 2591 n.9.

In contrast to the ICA amendments and *Ex Parte 392*, which seek to expedite rail line transactions by decreasing regulation, the RLA expressly regulates certain management decisions and delays their implementation pending exhaustion of the bargaining and mediation procedures set forth in the statute. For example, 45 U.S.C. § 156 (Section 156) requires a carrier to give notice of and bargain over any proposed changes in rates of pay, rules, and working conditions, and maintain the status quo until the conclusion of any such bargaining. The RLA also requires employees and carriers to submit any dispute over the interpretation or application of collective bargaining agreements to mandatory arbitration. *See* 45 U.S.C. § 153 First (i) (Section 153 First (i)); *see also* 45 U.S.C. § 152 First.

This brief overview of the RLA and ICA demonstrates that the two acts "reflect two different sets of congressional policies and therefore make uncomfortable bedfellows." *Railway Labor Executives Ass'n v. City of Galveston*, 849 F.2d 145, 149 (5th Cir. 1988) (*Galveston I*), *vacated and remanded on other grounds*, 109 S. Ct. 3207 (1989), *on remand*, 883 F.2d 16 (5th Cir. 1989) (per curiam), *opinion denying rehearing*, 897 F.2d 164 (5th Cir. 1990) (*Galveston II*). On the one hand, the Staggers Act seeks to expedite the approval of rail transactions "so that efficient transactions are not derailed by regulatory red tape." *Galveston I*, 849 F.2d at 149 (citation omitted). On the other hand, the RLA requires railroads to maintain the status quo pending completion

of the purposefully long and drawn out bargaining procedures set forth in the RLA. *Id.* In *Lake Erie*, to which we now turn, the Supreme Court attempted to accommodate and reconcile the competing objectives of the two statutes.

B. The *Lake Erie* Decision

The facts of *Lake Erie* can be briefly restated as follows. The Pittsburgh & Lake Erie Railroad Co. (P&LE) possessed trackage rights in New York and owned and operated 182 miles of rail line in Ohio and Pennsylvania. 109 S. Ct. at 2588. Between 1982 and 1987, P&LE lost $60 million dollars. After cost reductions and market expansion did not make the railroad profitable, P&LE decided to sell it assets for $70 million to P&LE Rail Co., Inc. (Railco), a newly formed subsidiary of Chicago West Pullman Transportation Corp. *Id.* Railco intended to continue operation of P&LE's lines, except that it would not assume P&LE's collective bargaining agreements and would hire only 250 of the 750 employees working for P&LE. *Id.* The unions objected to the sale, contending that the sale would affect the working conditions of P&LE's employees and was therefore subject to the mandatory notice, bargaining, and status quo provisions of 45 U.S.C. § 156 (Section 156). P&LE was willing to discuss the sale, but argued the sale was not subject to Section 156 because its mandatory notice, bargaining, and status quo provisions would intrude on the ICC's jurisdiction over the proposed sale and interfere with P&LE's prerogative to make the fundamental business decision of whether or not to leave the railroad business.[4] 109 S. Ct. at 2589.

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[4] In an attempt to compel P&LE to bargain over the proposed sale, the unions filed their own Section 156 notices proposing changes in the existing agreements to ameliorate the impact of the sale upon the employees. P&LE continued to deny that it had any Section 156 obligations regarding the proposed sale. *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2589-90 (1989).

In August 1987 the Railway Labor Executives' Association filed suit in federal district court seeking a declaratory judgment of P&LE's obligations under the RLA and an injunction prohibiting the sale pending P&LE's completion of its RLA bargaining obligations. *Id.* While the lawsuit was pending, Railco received an exemption from ICC regulation and the imposition of labor protective provisions pursuant to *Ex Parte 392*. *Id.* at 2591. The district court held that P&LE did not have a duty to bargain over its decision to sell, but was required to bargain over the effects of the sale on employees, and the status quo provision of Section 156 required that P&LE satisfy its bargaining obligations before the sale could be consummated despite the ICC's approval of the transaction. *Id.* at 2592. A divided court of appeals affirmed. *See* 845 F.2d 420 (3d Cir. 1988).

On appeal, the Supreme Court held that P&LE was not required to comply with the mandatory notice, bargaining, and status quo provisions of Section 156 after the proposed sale of all its rail assets was exempted from ICC regulation under *Ex Parte 392*. *Id.* at 2596. The Supreme Court first examined whether P&LE's decision to sell its assets and leave the railroad business was prohibited by any "*agreements* affecting rates of pay, rules, or working conditions." 45 U.S.C. § 156 (emphasis added). The Court held that no express or implied agreement prohibited the sale of the rail line, sought to confer any rights on its employees in the event of a sale, or guaranteed that jobs would exist indefinitely. 109 S. Ct. at 2593. Thus, the sale and resulting loss of jobs would not change any agreement between the P&LE and its employees.

The Court next examined whether P&LE was required to postpone the sale and maintain the status quo in response to the Section 156 notices filed by the union irrespective of any express or implied agreement because the sale would affect the objective working conditions as

defined in *Detroit v. Toledo Shore Line R.R. v. Transportation Union*, 396 U.S. 142 (1969) (*Shore Line*). Under *Shore Line*, the Section 156 status qou provision applies to " 'those actual objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose.' " *Lake Erie*, 109 S. Ct. at 2593 (quoting *Shore Line*, 396 U.S. at 153). The Court declined to apply *Shore Line*'s broad definition of Section 156's "working conditions" to P&LE's proposed sale. First, the Court believed that the extension of status quo protection to "objective" working conditions stretched Section 156's language "to its outer limits" and should be applied only with caution. 109 S. Ct. at 2594. Second, and more importantly, *Shore Line* did not involve a proposal by the railroad to terminate its business. Relying on *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) (*Darlington*), a case construing the duty to bargain under the National Labor Relations Act, the Court limited the duty to bargain as follows:

> [T]he decision to close down a business entirely is so much a management prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this case.

Lake Erie, 109 S. Ct. at 2595-96.

The *Lake Erie* Court proceeded to hold that P&LE was required neither to bargain about the decision to sell nor postpone the sale itself. P&LE was not totally relieved of its duty to bargain, but was only required to bargain about the effects of the sale until the date the exemption from ICC regulation became effective. *Id.* at 2597. Furthermore, P&LE was required to bargain only on those subjects which it, rather than the buyer, could satisfy. *Id.* The Court noted that its construction of the Section

156 mandatory notice, bargaining, and status quo provisions effectuated its duty to give meaning to both statutes, *id.* at 2596, and harmonized the two statutes "at least to a degree," *id.* at 2597. The Court also stressed that its construction of the RLA would effectuate Congress' objectives of deregulating the railroad industry and facilitating efficient transactions. *Id.* at 2597.

C. Application of *Lake Erie* to MT's Duty to Arbitrate

In the present case, the district court held that MT was not required to arbitrate under the RLA because the ICC exemption superseded the jurisdiction of the Special Board.[5] Armed today with the benefits of *Lake Erie*, we hold that the district court was correct in ruling that MT was relieved of its duty to arbitrate, but not because the ICA supersedes or preempts the RLA. We believe that *Lake Erie* provides the appropriate framework for reconciling the competing objectives and statutory regimes of the ICA and the RLA when they conflict, and is dispositive of this appeal. Applying the analysis adopted in

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[5] The district court relied in part on *Burlington Northern R.R. Co. v. United Transp. Union*, 848 F.2d 856 (8th Cir.), *cert. denied*, 109 S. Ct. 499 (1988), which held the RLA duty to bargain was superseded by an exemption granted pursuant to *Ex Parte 392*. At the same time the Supreme Court decided *Lake Erie*, it also vacated this court's decision in *Railway Labor Executives' Ass'n v. Chicago & N.W. Transp. Co.*, 848 F.2d 102 (8th Cir. 1988) (*North Western I*), *vacated*, 109 S. Ct. 3207 (1989), *on remand*, 890 F.2d 1024 (8th Cir. 1989) (*North Western II*), *cert. denied*, 110 S. Ct. 3237 (1990), which had also held that an exemption granted under *Ex Parte 392* superseded the RLA duty to bargain for reconsideration in light of *Lake Erie*. The *Lake Erie* Court was careful to caution that courts were not at liberty to choose between competing congressional enactments, 109 S. Ct. at 2596, and emphasized that its decision rested on its construction of the RLA and not on the preemptive force of the ICA, *id.* at 2597. The Supreme Court presumably vacated and remanded *North Western I* in order to allow this Court to correct its holding that *Ex Parte 392* superseded the RLA.

Lake Erie, we conclude that MT had an RLA duty to arbitrate pursuant to Section 153(i), but only about the effects of the lease transfer and not the decision of transfer itself. *See Lake Erie*, 109 S. Ct. at 2597. Moreover, MT had a duty to arbitrate about the effects of the lease only between January 21, 1987, and February 27, 1987, the date MCRC's *Ex Parte 392* exemption became effective.[6] *See id.* After MCRC's exemption became effective, TCU's duty to arbitrate was extinguished. TCU lost its RLA right to arbitrate by its failure to request arbitration until it served written notice on the NRLC on November 4, 1987, over eight months after MCRC's exemption became effective.

While acknowledging that *Lake Erie* governs this appeal, TCU argues that *Lake Erie* supports its position that MT was required to arbitrate. According to TCU, *Lake Erie* requires a court to identify the competing RLA and ICA interests at stake and harmonize those interests to the extent possible. TCU contends that the ICA interests at stake are minimal because requiring MT to arbitrate would not interfere with the lease transfer because it has already been completed. In contrast, TCU argues that the employees' RLA and collective bargaining rights to arbitration would be protected by requiring post-sale arbitration. TCU argues that because the transfer has already been effectuated, the ICA interests have been vindicated and the employees' RLA arbitration rights should prevail.

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[6] MT agreed to sell its rail assets to MCRC on January 21, 1987. On February 1, MT abolished all 30 of its rail positions, including the 10 employees represented by TCU. MCRC thereafter filed a Notice of Application for Exemption with the ICC, notifying the ICC of its noncarrier status and requesting that no labor protection conditions be imposed on the transaction. MCRC's application was published in the Federal Register on February 20, 1987, and became effective February 27, 1987. When the ICC exempted the acquisition from regulation and approved the sale, MT ceased being a carrier within the meaning of the RLA.

We disagree with TCU's assertion that *Lake Erie* requires us to identify and balance the RLA and ICA interests on a case-by-case basis. The Supreme Court has already identified and weighed the respective RLA and ICA interests at stake and has articulated an analytical framework which reflects its accommodation of the competing interests. We are required to apply this framework, and are not free to undertake our own *ad hoc, de novo* balancing of the competing interests every time a case arises that involves a conflict between the ICA and RLA. The competing statutory interests are reconciled in this case by enforcing the employees' RLA rights until the *Ex Parte 392* exemption became effective, after which the ICA obligations were controlling.

TCU tries to escape application of *Lake Erie* by arguing that its reach is limited to disputes involving Section 156's mandatory notice, bargaining, and status quo provisions. We are unpersuaded that *Lake Erie* can be so narrowly construed. While it is true that *Lake Erie* construed Section 156 of the RLA in relationship to the ICA, nothing in the opinion indicates that the analytical approach the Court adopted is confined to Section 156 cases or the particular facts before the Court. When the Supreme Court declines to limit the legal or factual reach of its decisions, "it is the principle [that] controls and not the specific facts [on] which the principle was decided." *Walker v. Georgia*, 417 F.2d 5, 8 (5th Cir. 1969). Because the *Lake Erie* decision was not explicitly limited, we are required to apply it to cases presenting similar facts and analogous legal issues.

We also note that it is particularly appropriate to apply *Lake Erie* to this case because the facts and policy considerations raised in the present case are almost identical to those presented in *Lake Erie*. The factual similarities between the two cases are striking. For example, both MT and P&LE were financially troubled carriers that transferred their assets to noncarriers, both of the

acquiring noncarriers were granted exemptions pursuant to *Ex Parte 392*, no labor protection conditions were imposed on either transaction, and the unions in each case invoked the RLA to secure labor protection conditions from the carrier. The instant case also raises many of the same policy considerations present in *Lake Erie*. The *Lake Erie* Court was especially concerned with effectuating Congress' Staggers Act objectives of facilitating economically efficient rail transactions, saving short lines, and revitalizing the rail industry generally. *See* 109 S. Ct. at 2596-97. These concerns are also present in the case before us.

TCU argues that requiring MT to arbitrate will not hinder efficient rail transactions because the lease transfer has already been consummated. To begin with, TCU's claim that it did not attempt to challenge the transaction itself is not supported by the record.[7] Even assuming that TCU only requested post-sale arbitration, we do not take such a sanguine view of the effect that post-sale arbitration would have on rail transfers. We believe that sales of rail lines would be deterred just as much by requiring post-sale arbitration under Section 153 First (i) as they would by requiring pre-sale bargaining under Section 156. For example, potential sales might be rendered unprofitable if sellers were required to arbitrate with unions after selling their rail lines. A prudent seller faced with post-sale arbitration would probably increase its asking price by the estimated cost of any judgment likely to result from arbitration. If a seller could not obtain a price that covered the likely costs of post-sale arbitration, it might simply choose to abandon the line pursuant to 49 U.S.C. § 10903, thus resulting in a

[7] In its submission to the Special Board, TCU requested that the Special Board order MT to maintain the status quo and refrain from completing the lease transfer. *See* MT's affidavits and Exhibits in Support of its Motion for Summary Judgment Exh. 2, at 14-15. TCU's request for a status quo order belies its assertion that it did not try to prevent the transfer.

loss of service and further weakening the railroad industry. As with pre-sale bargaining, we believe that post-sale arbitration "would likely result in cancellation of [prospective] sale[s] and the frustration of Congress' intent through ICA amendments to deregulate the rail and air industries generally and more specifically to assist small rail lines with financial problems." *Lake Erie*, 109 S. Ct. at 2597.

In addition to hindering economically advantageous transactions, post-sale arbitration could effectively negate a carrier's decision to leave the railroad business altogether. In *Lake Erie*, the Supreme Court refused to construe Section 156 to require P&LE to bargain over and postpone its decision to sell its assets and leave the railroad business. *Id.* at 2595-96. In contrast, when a carrier sells only some of its assets and remains in the railroad business, requiring post-sale effects bargaining does not intrude upon the carrier's prerogative to leave the railroad business. In *North Western II*, we discussed the importance of a carrier's decision to leave the railroad business:

> In [*Lake Erie*], the Supreme Court held that the obligation to bargain over effects existed only until the date for closing the sale arrived, which, of course, would not occur in this case until the [*E*]*x* [*P*]*arte 392* exemption became effective and the transfer occurred. We are convinced that the Supreme Court placed a time limitation on the obligation to bargain because after that date, the selling railroad would have no assets and no employees. Here, the selling railroad will retain the major portion of its assets and will continue to employ persons who are members of the labor organizations that are parties to this case. Thus C&NW can bargain about the effects of the sale without delaying or upsetting the sale.

North Western II, 890 F.2d at 1025-26 (citation omitted). Because MT transferred all of its assets, discharged all of its rail employees, and left the railroad business entirely, the present case is controlled by *Lake Erie* rather than *North Western II*. We refuse to construe the RLA and the collective bargaining agreements to require post-sale arbitration because it would interfere with MT's " 'absolute right to terminate [its] entire business for any reason [it] pleases.' " *Lake Erie*, 109 S. Ct. at 2595 (quoting *Darlington*, 380 U.S. at 268). We therefore conclude that *Lake Erie* controls this case and MT's duty to arbitrate terminated as of February 27, 1987.

D. Alleged Abrogation of Collective Bargaining Agreements

The last argument we need to address is TCU's contention that the present case is different from *Lake Erie* because two collective bargaining agreements secured arbitration rights for the employees, and the district court's decision effectively permitted the ICC to exceed its authority by abrogating existing collective bargaining agreements. In order to address this contention, we must first determine whether MT had a contractual duty to arbitrate the lease transfer. In *AT&T Technologies v. Communication Workers*, 475 U.S. 643 (1986) (*AT&T*), the Supreme Court identified several factors that should be considered in determining whether a duty to arbitrate exists. First, arbitration is a matter of contract and a litigant cannot be required to submit any dispute to arbitration which he or she has not agreed to submit. *Id.* at 648. Second, whether there is a duty to arbitrate a given dispute is a question for the court and not the arbitrator. *Id.* at 649. Third, in deciding whether the parties have agreed to submit a dispute to arbitration, the court is not to rule on the potential merits of the underlying claim. *Id.* Finally, where there is a contractual arbitration clause, there is a presumption of

arbitrability, meaning that arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 650 (citation omitted).

With these principles in mind, we examine whether MT had a contractual duty to arbitrate under the WJPA or Stabilization Agreement. Under Section 1 of the WJPA, the duty to arbitrate arises only when a coordination has occurred. Joint Appendix (J.A.) at 54. Section 2(a) defines a coordination as a "joint action by two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities." *Id.* Section 13 provides for "arbitration in the event that any dispute or controversy arises . . . in connection with a particular coordination." The rights guaranteed in the Stabilization Agreement arise when carriers make "technological, operational, and organizational changes." J.A. at 67. Under this agreement, carriers are permitted to make such changes and to transfer work and employees in exchange for labor protections for displaced workers. Article VII of the Stabilization Agreement provides for arbitration of disputes involving the interpretation and application of the agreement. J.A. at 72.

MT had no duty to arbitrate under the WJPA because no *coordination* between two or more *carriers* has occurred. There has been no joint action by two or more carriers by way of unification, consolidation, merger, or pooling of separate railroad facilities in this case." *See* J.A. at 54. MT has not joined with MCRC to operate terminal rail service in the Minneapolis-St. Paul area. MT has leased all its assets, terminated its rail employees, and gone out of the railroad business altogether. In addition to there being no joinder or merger of operations between MT and MCRC, there were not two or

more carriers as required for a coordination. Section 2(b) of the WJPA defines carrier by reference to the ICA. However, the ICC determined that MCRC was not a carrier at the time of the lease transfer and accordingly granted it an *Ex Parte 392* exemption, which is available only for acquisitions by noncarriers.

Similarly, MT had no duty to arbitrate under the Stabilization Agreement because its decision to lease its assets and leave the railroad business entirely does not constitute a technological, operational, or organizational change within the meaning of the agreement. In *Brotherhood of Railway, Airline & Steamship Clerks v. Kansas City Ry. Co.*, 587 F.2d 903 (8th Cir. 1978) (*BRAC*), *cert. denied*, 441 U.S. 907 (1979), we affirmed the decision of Special Board of Adjustment No. 605 that the railroad's decision to eliminate its mail and baggage handling operations altogether was not covered by the Stabilization Agreement. We cited the reasoning of the Special Board with approval:

> [T]he February 7, 1965 Stabilization Agreement was intended to provide protection to employees in the event of a decline in the Carrier's business. Said Agreement was not intended, in our opinion, to accord protection to employees when the work previously performed by them disappears entirely. The [Stabilization] Agreement simply did not address the question of what was to happen when there was a complete cessation of the Company's business. And merely because the Terminal Company was still engaged in activities separate and apart from mail handling, this nonetheless does not alter the fact that the mail handling work previously performed by the Claimants was completely abolished. . . .

Id. at 907. Unlike the railroad in *BRAC*, MT did not even continue operations in the railroad business. MT left the railroad business altogether. MT had no duty to arbitrate under the Stabilization Agreement because that

agreement does not apply when a railroad ceases doing business.

Brotherhood of Railway Carmen v. ICC, 880 F.2d 562 (D.C. Cir. 1989) (*Carmen*), *cert. granted sub nom. Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 110 S. Ct. 1522 (1990), and *Association of Flight Attendants v. Delta Air Lines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990) (*AFA*), the cases cited by TCU, do not persuade us that the ICC has abrogated collective bargaining agreements and exceeded its authority in this instance. In *Carmen*, the D.C. Circuit held that the ICA did not authorize the ICC to override explicit provisions of a collective bargaining agreement in approving a carrier's merger with other carriers. 880 F.2d at 567-68. In *AFA*, the D.C. Circuit held that the union certification procedures of the National Mediation Board (NMB) did not override a bargained-for successorship clause requiring a successor carrier to recognize the union. 879 F.2d at 916-17. While acknowledging that the NMB had exclusive jurisdiction over union representation disputes, the court held that the union could submit its breach of contract damages action for breach of the successorship clause to arbitration as provided for by the collective bargaining agreement. *Id.* at 917.

Carmen and *AFA* are clearly distinguishable from the present case. Most importantly, unlike the present case, explicit provision of the collective bargaining agreements were clearly violated in *Carmen* and *AFA*. In *Carmen*, the carrier explicitly agreed to employ "each covered employee for the remainder of his working life," 880 F.2d at 563, and breached this provision when it merged with other carriers, transferred work, and discharged covered employees. Likewise, the succesorship clause in *AFA* explicitely required Western Airlines to bind any successor to the collective bargaining agreement, and Western breached this clause by merging with Delta

without properly binding Delta. *See* 879 F.2d at 907. In distinction, neither the WJPA nor the Stabilization Agreement purport to guarantee covered employee jobs for life. Nor do the agreements protect employees if a carrier decides to go out of business. As we have demonstrated above, the WJPA was not violated because there was no coordination between two or more carriers, and the Stabilization Agreement was not violated because MT's decision to lease its assets, discharge its employees, and leave the railroad business was not a technological, operational, or organizational change. *Carmen* and *AFA* are distinguishable for a second reason. In both of these cases, the carriers merged and continued in their respective businesses after the mergers. In the present case, MT left the railroad business entirely, a fact the *Lake Erie* requires us to accord great significance. *See* 109 S. Ct. at 2594-95. In sum, *Carmen* and *AFA* are inapposite because, as was the case in *Lake Erie*, MT had no express or implied agreement with its employees that it "would not go out of business, would not sell its assets, or if it did, would protect its employees from the adverse effects of such action." *Id.* at 2573.

The WJPA duty to arbitrate arises only when there has been a coordination between two or more carriers. The Stabilization Agreement duty to arbitrate arises only when there has been a technological, operational, or organizational change. Because both agreements have arbitration clauses, there is a presumption of arbitrability. *AT&T*, 475 U.S. at 650. However, this presumption is clearly overcome in this case because we have determined "with positive assurance that the arbitration clause[s are] not susceptible of an interpretation that covers the asserted dispute." *Id.* Because MT had no duty to arbitrate under either the WJPA or the Stabilization Agreement, the ICC did not abrogate or otherwise violate any existing collective bargaining agreement when it granted MCRC an exemption from ICC regulation pursuant to

Ex Parte 392.[8] Having decided that the ICC exemption did not abrogate any existing contract right possessed by the employees, we need not reach TCU's claim that the ICC exemption effectuated a taking of property without just compensation in violation of the fifth amendment.

CONCLUSION

To summarize, we hold that MT's RLA duty to arbitrate was extinguished on February 27, 1987, the date the *Ex Parte 392* exemption became effective. The district court was therefore correct in holding that the Special Board had no jurisdiction to arbitrate the dispute, but not because the ICA superseded the RLA. We further hold that MT had no contractual duty to arbitrate the lease transfer, and therefore the ICC did not exceed its authority in granting the exemption, and no fifth amend-

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[8] Because the lease transfer did not violate or abrogate the WJPA or the Stabilization Agreement in any way, we express no opinion on whether the ICC exceeds its authority under the ICA when it grants an *Ex Parte 392* exemption that effectively abrogates an existing collective bargaining agreement. Perhaps the effectuation of Congress' Staggers Act objectives of deregulating and strengthening the rail industry would constitute "important public polic[ies]" warranting the abrogation of private agreements, *see Association of Flight Attendants v. Delta Airlines*, 879 F.2d 906, 916 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990), but we need not decide this question today. However, it is important to recognize that railroads owning approximately 85% of the railroad mileage in the country as well as 20 of the 21 national railroad labor unions were parties to the WJPA. *See New York Dock Ry. v. United States*, 609 F.2d 83, 86 (2d Cir. 1979). If the WJPA duty to arbitrate was found to survive the issuance of an *Ex Parte 392* exemption, many efficient transactions might not be consummated, thereby thwarting the objectives of the Staggers Act. We also note that the Supreme Court has granted certiorari in *Brotherhood of Railway Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989), *cert. granted sub nom. Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 110 S. Ct. 1522 (1990), so it is unclear whether the D.C. Circuit's holding that the ICC has no authority to abrogate existing collective bargaining agreements is a correct statement of existing law.

ment claim was raised by the exemption. Accordingly, the order of the district court is

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-88 Civ 52

MT PROPERTIES, INC.,
Plaintiff,

vs.

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Defendant.

CROSS-MOTIONS FOR SUMMARY JUDGMENT

January 11, 1989
St. Paul, Minnesota

* * * *

[4] Before the Court are plaintiffs MT Properties, Inc., hereinafter MT, and Transportation-Communications Employees Union, hereinafter TCU, cross-motions for summary judgment. The issue before the Court is whether the Special Board of Adjustment No. 605, hereinafter Special Board, has jurisdiction to arbitrate a claim filed by TCU against MT pursuant to the Railway Labor Act, 45 USC, Section 153 First. Under Section 153 First of the Railway Labor Act, disputes growing out of the interpretation or application of agreements concerning rates of pay, rules or working conditions may be referred by either party to the appropriate rate division of the adjustment board.

The dispute involved in this case grows out of two collective bargaining agreements signed by both MT and TCU. The first agreement is the May 1936 Washington Job Protection Agreement, WJPA hereinafter. The second agreement is the February 7, 1965 Stabilization Agreement, hereinafter Stabilization Agreement. Plaintiff claims that the Special Board has no jurisdiction to arbitrate defendant's claims in this case. Defendant claims that a presumption of arbitrability applies to claims under these two agreements, and that the Special Board has the appropriate jurisdiction in this case. The relevant facts are not in dispute.

[5] The Minnesota Transfer Railway Company, Minnesota Transfer hereinafter, was formed over 100 years ago by several railroad companies to operate terminal rail service in the St. Paul-Minneapolis area. Minnesota Transfer employed approximately ten employees who were represented by defendant TCU. On December 11, 1986, Minnesota Transfer changed its corporate name to MT Properties, Inc. However, it continued to operate as Minnesota Transfer. MT was, like its predecessor Minnesota Transfer, a "carrier" within the meaning of the Railway Labor Act.

On February 1, 1987, the rail assets of MT were acquired through a long-term lease, hereinafter the acquisi-

tion, by the Minnesota Commercial Railway Company, hereinafter Minnesota Commercial. After the acquisition, MT merged with the St. Paul Union Depot Company. The name of the surviving company remained MT Properties, Inc. The new company kept Minnesota Transfer as an operating name. In leasing its rail assets, MT abolished all of the approximately 30 jobs connected to its previous rail service. Approximately ten of those employees were represented by the defendant, TCU.

Pursuant to the Interstate Commerce Commission, the ICC, to that commission's ruling in ex parte 392, Minnesota Commercial applied to the ICC for an exemption from the ICC's acquisition regulations. Ex parte 392 provides that exemptions from acquisition regulation should be standard except where a [6] class I carrier abandons a line and another class I carrier acquires that abandoned line in a transaction that results in a major market extension.

Minnesota Commercial's application for exemption was published in the Federal Register on February 20, 1987. The exemption became effective seven days after publication. In accordance with the standard practice in cases of exemption, no labor protective conditions were imposed. Thereafter, the Brotherhood of Maintenance of Way Employees, BMWE, filed a petition for revocation of the exemption with the ICC. The BMWE alleged that the acquisition constituted an abandonment and sale of a rail line between the two carriers. The BMWE asserted that the ICC should impose labor protective conditions upon the MT-Minnesota Commercial transaction.

The ICC denied the BMWE's petition for revocation. The ICC stated that the BMWE had offered no evidence that this was a transaction between two carriers. Hence, the ICC reaffirmed the exemption and refused to apply any labor protective conditions.

By letter dated November 4, 1987, defendant TCU served written notice on the National Railway Labor Conference, NLRC, of its invocation of the services of

the Disputes Committee to settle a dispute between TCU and MT regarding the interpretation and application of the WJPA and stabilization agreement. The NLRC referred the dispute to Special Board of Adjustment No. [7] 605, an arbitration panel established by the Railway Labor Act, the WJPA, and the Stabilization Agreement. Both sides have submitted their positions to the Special Board.

Plaintiff then filed this suit seeking a declaratory judgment from this Court that the Special Board has no jurisdiction over this matter and seeking a permanent injunction prohibiting TCU from attempting to arbitrate this dispute under the WJPA and Stabilization Agreement before the Special Board. Both sides have now moved for summary judgment.

Both parties agree that the issue of whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue for judicial determination, not determination by the arbitrator. The parties in the instant case have differing views as to what they agreed to in the WJPA and the Stabilization Agreement.

Plaintiff contends that the parties agreed to arbitrate only in circumstances where a party had engaged in a coordination. Therefore, plaintiff concludes that it is for the Court to determine whether MT engaged in a coordination in this case. Defendant argues that the WJPA states on its face that the parties agreed to arbitrate the issue of whether coordination has taken place. Defendant asserts that the issue of whether MT engaged in a coordination is properly before the arbitrator.

The questions submitted to the Special Board by the [8] TCU essentially asks the Special Board to determine whether MT has participated in a coordination within the meaning of the WJPA, and whether MT has participated in an operational organizational change within the meaning of the Stabilization Agreement. If the Special Board answers these questions in the affirmative, then

the board will automatically impose the labor protective conditions contemplated in the two agreements.

The Eighth Circuit recently has addressed this issue of arbitrability in Intern Association of Machinists versus Republic Airlines at 829 F.2d 658, a 1987 decision. In Machinists, the collective bargaining agreement provided that "the Board shall consider any dispute properly submitted to it when such dispute has not been previously settled in accordance with this agreement."

The district court had held that the issue of when a dispute had been previously settled should be determined by the arbitrator. The Machinists court reversed this decision. The court ruled that where there was an express contractual provision specifically excluding an issue from arbitration, the usual presumption in favor of arbitration did not apply. The Court held that the agreement in that case excluded previously settled disputes from arbitration. Hence, the district court erred in submitting the determination as to whether the dispute was previously settled to the arbitrator.

Plaintiff argues that in the instant case, the parties [9] have agreed to arbitrate only in the event of a coordination. Plaintiff concludes that the parties expressly excluded from the arbitration the issue of whether a coordination had occurred.

However, the court of Machinists relied on the Supreme Court's opinion in AT&T versus Communications Workers. In AT&T, the court considered the parties' duty to arbitrate in light of a broad arbitration clause which provided for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder." The court stated that in such cases, in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.

In the instant case, Section 3(a) of the WJPA states in relevant part that "The provisions of this agreement

shall be effective and shall be applied whenever two or more carrier parties hereto undertake a coordination. Section 13 of the WJPA further states:

In the event that any dispute or controversy arises in connection with a particular coordination, including an interpretation application or enforcement of any of the provisions of this agreement, it may be referred by either party for consideration and determination to a committee.

This language does not specifically exclude the issue of when a coordination has occurred from arbitration. Rather, [10] this language is in the nature of a broad arbitration clause, similar to the one considered by the Supreme Court in AT&T. The WJPA indicates an intent by the parties to submit the issue of when a coordination has occurred to the arbitrator. Plaintiff has not overcome the presumption in favor of arbitration which attaches to a broad arbitration clause. Therefore, plaintiff's argument that this Court must determine whether a coordination has occurred is mistaken.

I point this out so that plaintiff may address the Court's prejudices in this matter and convince the Court to the contrary if you can.

Plaintiff argues in the alternative that the ICC's grant of exemption under ex parte 392 preempts the duty to arbitrate created by Section 153 First of the Railway Labor Act. Plaintiff argues that the Special Board has no authority to impose labor protective conditions under the WJPA or Stabilization Agreement in light of the ICC's exemption of the transaction from any protective conditions.

The Eighth Circuit has recently considered the interplay between the ICC's exemption rulings under ex parte 392 and the Railway Labor Act. In Burlington Northern Railroad Company versus United Transportation Union at 848 F.2d 856, the 1988 Eighth Circuit decision, the court held that the ICC authority to supervise and implement labor protective conditions in terms of sales, acquisitions and abandonments by railway [11] carriers

superseded the mandatory bargaining provisions imposed on the parties by the Railway Labor Act. The Burlington Court reasoned:

"In these narrow circumstances, the ICA supersedes the authority of the mandatory bargaining provisions of the RLA, which provide an essentially duplicative or overlapping process designed to reach labor protective agreements. Were it otherwise, the ICC's authority in this area and specifically its recent deregulatory actions would be largely nullified.

In the instant case, the arbitration provisions, not the mandatory bargaining provisions, of the Railway Labor Act are involved. However, the force of the Burlington Northern court's reasoning would appear to apply equally here. In this case, as in Burlington Northern, enforcement of the Railway Labor Act provisions would largely nullify the ICC's ability to deregulate short-line rail sales from a carrier to a non-carrier.

Defendant argues that this case is distinguishable, because the RLA conditions superseded in Burlington Northern would have been imposed before the sale could take place, while the conditions at issue here would be imposed after the sale had occurred.

The Court has difficulty accepting this distinction. Again, I call this to your attention in case you wish to argue it.

[12] The Staggers Rail Act of 1980, Public Law No. 96-448, which empowered the ICC to promulgate ex parte 392 was an attempt to "reduce regulatory barriers to entry into and exit from the railroad industry." Imposition of post-sale labor protective conditions are just as likely to deter a protective purchaser as would presale protective conditions.

The whole point of ex parte 392 is to give the ICC the power to allow the sale of a short-line to a non-carrier with no labor protective conditions. In the instant case, enforcing the arbitration provisions of the Railway Labor Act would also be at loggerheads with the ICC's decision.

Defendant further argues that this case is distinguishable from Burlington Northern and C&NW due to the fact that the underlying source of the labor protective conditions in this case are two private collective bargaining agreements between MT and TCU. Defendant further argues that it would be unconstitutional and totally inequitable for this Court to hold that an ICC exemption preempts the parties' collective bargaining agreements.

I have gone beyond what I ordinarily do, and I have stated some of my reservations of record. I have done that deliberately so that the parties may know the Court's inclincations and may address them.

All right, we have the motions by the—well, we have cross-motions. I assume plaintiff has filed first. I don't [13] know.

* * * *

[27] THE COURT: Thank you. I am ready to rule. This court does not hold that the ICC exception preempts all collective bargaining agreements. Rather, the Court's ruling will be that the ICC exemption supersedes the jurisdiction of the Special Board, which is solely a creation of the Railway Labor Act to act under the arbitration provisions of that particular act.

The ICC has concluded that the transaction involved a carrier and a non-carrier. Hence, a coordination did not occur. Based on the reasoning in Maine Central Railroad cited by both the parties—I won't have to give it back to you—the applicability of the WJPA is, therefore, questionable.

Plaintiff has argued that this Court should grant an injunction permanently enjoining defendant from attempting to impose the conditions of the WJPA or the Stabilization Agreement. However, if the Court grants—which the Court [28] intends to do—plaintiff's request for a declaratory judgment stating that the Special Board does not have jurisdiction in this case, there is no need for a preliminary injunction, because the declaratory judgment would be an adequate remedy at law.

I am going to deny the defendant's motion for summary judgment, and I am going to grant the plaintiff's motion for summary judgment as to Count I, the request for declaratory judgment, to the extent that it alleges that Special Board 605 has no jurisdiction to enter or rule on this dispute.

The Court will further order judgment that the ICC order issued pursuant to ex parte 392 preempts the Special Board's jurisdiction under the Railway Labor Act, the WJPA or the Stabilization Agreement to arbitrate this dispute.

Finally, as to plaintiff's motion for summary judgment as to Count II, requesting the injunctive relief, that will be denied. I will have plaintiff provide the Court with an order to be signed.

Very well, that will be all.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-88-52

MT PROPERTIES, INC.,

Plaintiff,

vs.

TRANSPORTATION-COMMUNICATIONS EMPLOYES' UNION,

Defendant.

ORDER

This matter was heard by the Court on January 11, 1989, pursuant to a motion by MT Properties, Inc. seeking summary judgment. Plaintiff was represented by Timothy R. Thornton, Of Counsel to Briggs and Morgan, P.A., 2400 IDS Center, Minneapolis, Minnesota. Defendant was represented by John O'B. Clarke, Jr. of Highsaw & Mahoney, Suite 210, 1050 17th Street N.W., Washington, D.C.

Based upon the arguments of counsel, the briefs, files, and records in this case, and the findings of this court made at the conclusion of counsels' arguments, Plaintiff is hereby granted a declaratory judgment as follows: the Special Board of Adjustment has no jurisdiction under the Washington Job Protection Agreement of 1936 or the February 7, 1965 Job Stabilization Agreement to determine the issues raised by Defendant.

Dated: January 19, 1989

BY THE COURT:

/s/ Robert Renner
ROBERT RENNER
Judge of the Federal
District Court

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5061MN

MT PROPERTIES, INC.,
Appellee,

v.

TRANSPORTATION-COMMUNICATIONS
INTERNATIONAL UNION,
Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

October 31, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk,
U. S. Court of Appeals,
Eighth Circuit

APPENDIX E

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 3

45 U.S.C. § 153

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope. as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall

select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appontment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and

designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers,

express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, in failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(*o*) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail

he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in the United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within

the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several division or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Therefore each division shall annually designate one of its members to act as chairman and one of its members to act as vice

chairman: *Provided, however*, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division

of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph *(l)* hereof, with respect to a division of the Adjustment Board.

II. INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101, *et seq.* (Excerpts)

A. Section 10505

49 U.S.C. § 10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope; or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707

of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

B. Section 10901

49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall—

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c) (1) If the Commission—

(A) finds public convenience and necessity, it may—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construc-

tion or acquisition (or both) and operation approved by the Commission.

(d) (1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

CONSTITUTIONAL PROVISIONS RELIED UPON

I. FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.